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In the Supreme Court of the United States

OCTOBER TERM 1938.

MRS. ZILLAH LYON ..... Petitioner

vs. No. 189.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION ..... Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THOMAS B. PRYOR,
Counsel for Respondent.

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Cases Cited

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT

The complaint upon which this case was tried sets out at length that the petitioner failed to pay a premium upon policy due July 1st, 1934, and pleads what she claims are facts excusing and justifying that failure and which she claims would prevent the petitioner from "declaring a forfeiture." The policy is a term policy and not a life policy that can be terminated only for failure to pay premiums. The policy specifically reserves to the company the right to terminate the policy on any premium paying date by refusing to accept the premium.

The respondent filed a demurrer which was overruled, and at the time of the trial it developed for the first time that the petitioner claimed to have paid, at the time the policy was delivered $74.00, so as to keep the policy always paid up a year in advance.

At page 10 of the petition counsel set out what he says are the material allegations of the complaint with reference to the payment of premiums. The first of those allegations is that the policy was issued under the terms of payment as set out in clause "C" of the additional provisions of the policy and does not in itself contain any information that the plaintiff intended to claim that $74.00 was paid in addition to the sum required to be paid to keep the policy in force until the first day of April, 1927, which was the date specified in the policy for the beginning of quarterly renewals.

The next allegation is a conclusion that all of the dues and assessments had been paid, which counsel for respondent, as it had a right to, took to be based upon the specific facts alleged.

The third allegation, which in the complaint is separated from the other allegations by several hundred words, alleges that the premiums actually paid amounted to $464.00 (which is the total sum of the twenty-nine quarterly premium payments), and an additional sum of $48.00, which is not alleged to be premiums. Furthermore, at page 10 of counsel's petition he does not set out the full paragraph and inserts after the semi-colon words that are located some nine hundred words later in the complaint. Petitioner seeks to recover under the provisions of the policy the $464.00 in premiums with four per cent interest, does not seek to recover the $48.00, which she would be entitled to if it were a premium. (R. 13). The last half of the allegation which begins at the bottom of page 10

of counsel's brief and extends to page 11 is found at page 15 of the record following the detailed allegations of excuse or failure to pay the premium due on July 1st, 1934, and constitute no more than a conclusion that under these facts the premium should be considered in law as paid.

At the trial petitioner abandoned the effort to establish liability on the basis of the excuses alleged in the complaint for failure to pay the July 1st, 1934 premium, and relied instead upon her testimony that at the time the policy was delivered to her husband, the assured, $74.00 was paid to the agent for the purpose of taking the place of days of grace, since the policy had no provision for extension of time to pay premiums. Respondent moved to strike this testimony as not responsive to the issues made by the pleadings, which motion was overruled. Then the respondent moved for a continuance on the grounds of surprise and that if a continuance was granted would show that $74.00 was never paid or received by the company, and offered to show by witnesses that neither petitioner nor counsel had ever claimed or even intimated previous to the trial that $74.00 or any other sum had been paid.

Petitioner introduced the policy and the premium receipts. The policy specifically provides the date upon which the first quarterly premium shall be paid and the premium receipts each specifically state the date the insurance expires, and the application states that premiums are payable $16.00 quarterly. The petitioner had each of the twenty-nine premium receipts excepting two and for

these two she had cancelled checks showing payment. She did not have any memorandum of any kind as to payment of the $74.00, which she claimed was made to an agent of the company who was dead at the time the suit was filed.

Respondent then moved for a directed verdict upon the grounds, *first*, that the policy terminated by its own terms on the first day of July, 1934, *second*, that the policy contained an option in favor of the company to reject any premium payment and that that option was exercised when the premium was tendered on July 6th, 1934, *third*, that the premium receipts themselves, offered by the defendant, show that the policy terminated on the 1st day of July, 1934, which was admittedly prior to the date of the loss. The Court upon his own motion then instructed a verdict in favor of the plaintiff.

At page 11 of petitioner's brief the assignments of error which he says are material are that the Court erred in overruling the motion to stike the testimony with reference to the payment of $74.00, in overruling of defendant's motion for an instructed verdict, and in directing a verdict for the plaintiff. An additional assignment is No. 7 that "the Court erred in entering judgment on the verdict, as there is no substantial evidence to sustain the verdict." (R. 52).

At page 4 of counsel's petitioner he purports to set out a clause of the policy, being clause "C" at page 3 of the policy. We call the Court's attention to the fact that the clause itself is not in two sentences as would appear

from this quotation, but is one complete sentence, and when read as such does not support the statement interposed between its parts.

SUMMARY OF ARGUMENT

Point A.

THE ALLEGED CONFLICT IS ON PROCEDURAL MATTERS ONLY, AND THERE IS NO SHOWING THAT THE PROCEDURE OF RESPONDENT IN APPEAL TO THE COURT OF APPEALS IS INSUFFICIENT.

Point B.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS IN THIS CASE AND THE LAWS AND DECISIONS OF ARKANSAS AND NO SHOWING IS MADE TO ENTITLE PETITIONER TO ISSUANCE OF THE WRIT.

1. Mrs. Lyon's testimony was incompetent—a soliciting agent cannot vary the terms of a policy after application is made and policy issued.

2. The policy was term insurance and no citations hold the contrary.

3. Petitioner's testimony not conclusive.

BRIEF AND ARGUMENT

Point A.

Petitioner alleges as a ground for the issuance of the writ that each holding of the Circuit Court of Appeals is in conflict with the decisions of the Arkansas Supreme Court and that the decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal. The first specification of error deals with the alleged conflict between Circuits.

It will be noted that it is not claimed that the conflict is in substantive law but in rules of procedure, and we do not understand that under the rules of this Court such a conflict will be reviewed, especially in view of the fact that the rules of procedure in the different Circuit Courts of Appeal are not uniform.

However, counsel for appellee have not cited any cases in point on this question. In the first case cited, the Board of Commissioners of Kearney, Kansas v. Irvin, 126 Fed. 689, no exception of any kind was saved, and in all the other citations various courts held that the assignment of error was too general and indefinite, while in the case at bar specific objection was made to the testimony was challenged, proper exceptions saved and an assignment of error cased thereon. The opinion of the Court of Appeals does not suggest that the assignment of errors was insufficient, too general or too indefinite.

Furthermore, it is within the power of the Court to notice error if it should so desire. In the case of Dela-

ware & H. R. Corporation v. Cottrell, 69 Fed. (2d) 195, it is held:

> "Failure seasonably and specifically to except at the trial is fatal unless this Court on its own motion disposed to review the error so assigned."

Counsel also overlooked the motion for directed verdict, which raises every question decided and discussed by the Court of Appeals.

Point B.

ALLEGED CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF ARKANSAS:

I

Reason No. I for the issuance of the writ states that the policy was applied for and delivered in Arkansas and that it is an Arkansas contract governed by the state laws. This is true under the decision of this Court in Erie v. Tompkins. However, it is necessary that petitioner show this Court a conflict which might result in a different conclusion before she would be entitled to have certiorari granted.

This Court said in the case of Ruhlin v. New York Life Insurance Company, 82 L. Ed. 823, decided by this Court May 2nd, 1938:

> "A different case might have been presented and the facts and authorities developed in another fashion if the parties had had in mind from the first the rule of the Pennsylvania Court would be applied."

In the case at bar petitioner has wholly failed to show that there might have been any different result had

any Arkansas decision been applied. In other words, a mere claim that the decision is in conflict with local law without any showing of conflict or that there is some possibility that a reconsideration of the case in the light of state law would affect the decision, is insufficient.

As stated, Reason No. I contains only a bald assertion that each holding of the Circuit Court of Appeals is in conflict with the decision of the state law. In subsequent numbered paragraphs petitioner sets out the specific holdings which he says are in conflict with state law, and we will consider each one separately and show that no conflict has been established.

II.

Petitioner's brief says:

> "The holding that the testimony of Mrs. Lyon is incompetent and the local Treasurer's action in receiving the first year's premium in advance was unauthorized is in conflict with the following decisions of the Supreme Court of Arkansas * * * *"

Counsel have misinterpreted the opinion of the Court below, for that Court did not hold that

> "the local Treasurer's action in receiving the first year's premium in advance was unauthorized * * * *"

but held that the local Treasurer had no power to alter the terms of an insurance policy after an application had been made and the policy issued.

The case of Queen of Arkansas Insurance Company v. Malone, 111 Ark. 229, and the case of Concordia Fire

Insurance Company v. Mitchell, 122 Ark. 357, cited by petitioner, hold that a soliciting agent had the power to waive proof of loss. There is quite a difference between the power of an agent to waive proofs of loss and the power to make unusual terms of a policy. No proofs are involved in this case and the cases cited have no application whatsoever.

The case of Caldwell v. Fitzhugh, 175 Ark. 806, cited by counsel, was a case where an insurance company was engaged in the business of writing insurance and in making loans and had an agent empowered to make loans, and since he was generally empowered to do so, his agreement was binding upon the company. There is no suggestion in this case that the deceased's local Treasurer at the time the policy was delivered had any power to change or vary the terms of the policy, and no case is cited by petitioner where the Supreme Court of Arkansas has so held. On the contrary, the decision of the Court of Appeals is in conformity with the decisions of the Supreme Court of Arkansas, one of the recent decisions being the case of Sadler v. Firemen's Fund Insurance Company, 185 Ark. 480. In that case the Court said:

> "A soliciting agent has no authority to agree upon terms to be inserted in policies or to change or modify or waive terms contained therein." (Citing cases).

These cases could be multiplied but we cite this one to show that counsel has failed to apply the proper decisions of the State Court in view of the holding of the Court of Appeals.

The case of California Insurance Company v. Union Compress Company, 133 U.S. 418, cited by counsel, has no bearing on the case at bar that we have been able to find. The case of Home Insurance Company v. Baltimore Warehouse Company, 93 U.S. 542, also deals with waiver of proof of loss. The case of McMaster v. New York Life Insurance Company, 183 U.S. 25 is not in point, but the facts there were that an agent inserted in the application a provision as to the date the policy should bear contrary to the agreement made by the agent with the assured. The holding of this Court was that the assured was not bound by the act of the agent. The agent was not authorized by the assured to insert the provision.

It will be noted in the McMaster case supra the Court stated that the case involved the statutes of Iowa.

There is no conflict in the decisions of this Court and the decision of the Court of Appeals in the case at bar, and as stated by counsel for appellee, the controlling decisions are the decisions of the Supreme Court of Arkansas.

The case of Life & Casualty Insurance Company of Tennessee v. Ford, 172 Ark. 1088 is cited, which holds that ambiguous provisions of an insurance policy should be resolved against the company. This is correct law both in the State Courts and in the Federal Courts, but the Court of Appeals in this case found no ambiguity and the citation has no application to this case.

The case of Hartford Life Insurance Company v. Wil-

son, 127 U.S. 467, is cited at page 23 of petitioner's brief. The holding of that case was that where the agent doubted his authority to write a policy of fire insurance, but did write it upon condition that it be accepted by the company before becoming effective, the accidental delivery of the policy after rejection by the company did not render it effective to cover a loss sustained. This case has no application to the question before this Court.

The case of Mutual Benefit Life Insurance Company v. Robinson, 58 Fed. 723, is not in point as it deals solely with the powers of agents in taking applications and it is not contended in this case that the agreement to pay and accept a year's premium in advance was made at the time the application was taken but is claimed to have been made at a subsequent time when the policy had been issued and was delivered. The headnote in that case states:

> "A provision in a life insurance policy withholding from the agents authority 'to make, alter or discharge this or any other contract in relation to the matter of this insurance' does not limit the powers of the insurer's agents in preparing and accepting an application for insurance."

The case of Peoples Fire Insurance Association v. Gonis, 79 Ark. 315, 16 L.R.A. (N.S.) 1180, has no bearing upon the case at bar. In that case an agent inserted answers in the application and it was held that the company was estopped to question the truth of the answers. This case does not involve the application or the truth of the answers therein, but as above pointed out, the

application was made prior to the alleged agreement to pay a year's premium in advance.

Counsel states:

> "Provisions for payment of renewal premiums are separate and not attached to payment of first premium."

The case of McMaster v. New York Life Ins. Co., supra, is cited. We find no connection between the case cited and the statement made, but in any event no citation from the Arkansas Supreme Court is made. The Court of Appeals stated the questions involved in this case as follows:

> "* * * that there was no competent or substantial evidence to sustain plaintiff's allegations that the insured had paid all of the premiums and kept the policy in force and effect at the time of the death." (R. 63).

The other question determined by the Court of Appeals as shown by the opinion (R. 63) was that the insurance involved was term insurance only and that the acceptance of any premium was optional with the association, which option was exercised and the premium due on July 1st, 1934, was rejected and the policy terminated nineteen days before he death of the assured.

We call the Court's attention to the concluding paragraph of the opinion (R. 66-67):

> "The declaration of the application that the premium for the policy was $16.00 quarterly, taken with the provision of Clause (C) that payment of $16.00 quarterly, beginning with April 1st, 1927, was

required to keep the policy in effect and with the statement in the application that the premium was payable quarterly, manifests the intent of the parties to contract for insurance on the quarterly payment plan. The insured began making quarterly payments of $16.00 immediately before the date April 1st, 1927, and kept them up each quarter for years and that is what the parties meant and intended should be done.

On page 21 of petitioner's brief it is stated:

> "It is not uncommon for a policy holder to deposit funds with the insurance company to meet premium payments subsequently coming due."

There is no testimony in the record upon which to base this statement, either as to this company or other companies generally, and as a matter of fact it is uncommon and not tolerated at all by the respondent.

Counsel also argues that the terms of the policy require the payment in advance of $74.00 and that the policy when issued was, under these terms, paid a year in advance. The opinion of the Court of Appeals (R. 66) disposed of this contention by saying:

> "On casual inspection the reference in the clause to the 'payment in advance of $74.00' might seem to imply an acknowledgment by the association that it had received a payment in advance for a year in the said sum of $74.00 but more careful consideration of the contract convinces that the association did not intend to, and did not declare or acknowledge anywhere in the writing that it had actually received such sum or that it had received a year's premium."

Counsel cites no case from Arkansas or from any other jurisdiction contrary to this holding.

Furthermore, the option reserved in the policy to terminate the contract at any premium paying period could be exercised notwithstanding such a deposit if it had in truth actually been made. On this point counsel has failed to show any conflict with the Arkansas law or that there might be any different conclusion reached by the Court of Appeals upon a reconsideration of the case.

III.

Petitioner's third reason for the allowance of the writ seems to be that the holding of the Court of Appeals that the policy was a term insurance contract and not assimilated to life insurance is contrary to the decisions of Arkansas Supreme Court. The citations offered in the petition and brief announce the rule of construction prevailing both in the State Court and in the Circuit Court of Appeals to the effect that when there are conflicting provisions in a policy of insurance, the one most favorable to the assured will be adopted. This is the universal rule of construction of insurance policies, but the Court of Appeals did not refuse or fail to apply this rule of construction, but found that there was no conflict and found also that the additional provisions for accidental death did not make the contract one of life insurance.

The Court did not find any conflict between the express provisions of the policy fixing the terms and dates of expiration and the other provisions, which added a benefit for accidental death only under certain conditions. The opinion itself clearly expresses the holdings

of the Court with reference to term insurance. Counsel cite no case holding that a contract similar to the one involved in this case can be terminated only upon notice for failure to pay premiums, as in the case of life insurance contracts. The Court of Appeals found there was no ambiguity—found that there was no question about the right of respondent to terminate the policy at any premium paying period. There could be no question as the language is plain and explicit, and petitioner, acting as the assured's agent received twenty-nine quarterly receipts, each stating specifically the date the insurance terminated.

At page 24 of the brief petitioner re-argues the provisions of the policy which he claims converts the policy from one of term to lifetime insurance, but does not support his argument by any citation of authority from Arkansas or elsewhere. This holding is not in conflict with any authority and is supported by logic, reason and general principles of law and justice.

The Arkansas case of Burlington Insurance Company v. Threlkeld, 60 Ark. 539, is cited under this point in the argument in support of the statement that termination of the agency was not binding on the insured without notice. But as petitioner herself testified on April 1, 1934, she made her payment at Little Rock and had notice of the change of place of payment of premium and the termination of the agency of Mr. Hamilton; yet this is not the material point in this case, for whether she had notice, or not, could not in any wise affect the right of the respondent to terminate the policy at any premium pay-

ing period. Petitioner has failed to show any conflict with Arkansas decisions on this point.

IV

On page twenty-six of petitioner's brief under "Specification No. 4", which does not appear from the petition itself to be a reason relied upon for the issuance of the writ, counsel says that the testimony of the petitioner relating to the payment of the premium for the first year in advance is undisputed. This is in the face of the fact that the record shows that petitioner carefully preserved every receipt that was issued to her for the renewal premiums over a period of more than seven years, yet she did not have any written memoranda for the alleged payment of $74.00. At no time during this seven year period was any objection made to the date fixed in the receipts for the termination of the policy. She was the one interested witness in this case. It is unconceivable that her testimony could be considered undisputed.

The Supreme Court of Arkansas in the case of Blankenship v. Modglin, 177 Ark. 388, 68 S.W. (2d) 531, stated:

> "Blankenship relied upon his own testimony in the case to show that the mortgage indebtedness was not made. This Court is committed to the rule that the positive testimony of an interested party will not be treated as undisputed."

And Mrs. Lyon was the beneficiary under the policy and was the only witness in her behalf.

Counsel also says that by cross examination of this

witness and by eliciting the same information or amplifying it upon cross examination respondent waived its right to challenge the testimony. It is a strange rule that a party is bound by the testimony of a witness upon cross examination, and no cases are cited in support of it. However, the Court below in the majority opinion did not deal with this phase of the case, and there is no showing that the failure to do so is in conflict with any Arkansas law.

CONCLUSION

Petitioner has failed to show any reason to justify this Court in granting certiorari. The alleged conflict between Circuit Courts of Appeal is on matters of procedure, but in any event an examination of the record discloses adequate procedural steps taken by the respondent and the authorities cited by petitioner are inapplicable to this case.

Petitioner has not shown, by any authority, that a policy such as the one involved here is not term insurance. She has failed to show that the right to terminate the policy at any premium paying period was abrogated under any law or decision of Arkansas. She has failed to show that the policy did not expire before the death of the insured and has failed to show by any Arkansas decision that the testimony of the petitioner that $74.00 was paid in advance is competent.

The citations of authority offered in the petition and brief are general propositions, usually applied by the

State and Federal Courts alike—where the facts warrant, but are inapplicable here. There is no conflict between the decisions of the Circuit Court of Appeals and the decisions of the Supreme Court of Arkansas.

The petition for certiorari should be denied, for petitioner has failed to show that there might be any different decision should certiorari be granted and the Arkansas law applied. If the case is remanded to the Court of Appeals that Court will find itself in the same situation that existed at the time the case was originally decided, and will have no other or different law to apply than was applied at that time.

Respectfully submitted,

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Counsel for Respondent.